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# In the Supreme Court of the United States

No. 707

OCTOBER TERM, 1955.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

*Appellant,*

vs.

HELEN L. SKIBA, Administratrix,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

## JURISDICTIONAL STATEMENT.

EDWIN KNACHEL,
DONALD E. RYAN,
1706 Union Commerce Building,
Cleveland 14, Ohio,
*Counsel for Appellant.*

DONALD W. HORNBECK,
*Of Counsel.*

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*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

## JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Court of Appeals of Ohio, County of Cuyahoga, Eighth District, rendered in this case on March 11, 1955. Appellant carried its case herein to the Supreme Court of Ohio by way of motion to certify the record, but the Supreme Court of Ohio refused to entertain the cause as indicated by the entry of that court dated June 29, 1955, overruling Appellant's motion to certify. A certified copy of that entry is attached hereto as Appendix "A."

This statement is submitted for the purpose of showing that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

## OPINIONS BELOW.

There have been no opinions, either official or unofficial, published by any of the courts below in this cause. A copy of the memorandum opinion of the Court of Appeals, upon application for amplification, is attached hereto as Appendix "B."

## JURISDICTION.

(i) This action was brought at common law in the Court of Common Pleas of Cuyahoga County, Ohio.

(ii) The date of the judgment of the Court of Appeals of Ohio, County of Cuyahoga, Eighth District, here sought to be reviewed is March 11, 1955. A copy of the entry of that court is attached hereto as Appendix "C." On March 12, 1955, Appellant duly filed with said Court of Appeals its application for amplification in which it sought to have the court amplify and explain what error was found in the record (Record—Appellant's Application for Amplification, p. 2). On March 31, 1955 the Court of Appeals of Ohio granted Appellant's application (Record—Court of Appeals Certificate of Docket and Journal Entries, p. 2) and wrote a *per curiam* opinion (Appendix "B"). On March 30, 1955 Appellant filed its notice of appeal to the Supreme Court of Ohio and on April 8, 1955 filed its motion to certify the record of the Court of Appeals of Cuyahoga County in the Supreme Court of Ohio (Appendix "D"). On June 29, 1955 said Supreme Court of Ohio overruled Appellant's motion to certify (Appendix "A").

(iii) Jurisdiction is conferred upon this Honorable Court by virtue of the terms of § 1257(2) of the Judicial Code, 28 U. S. C. § 1257(2), which provides as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(2) *By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.*" (Emphasis added.)

(iv) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to hear this case are *Fiske v. State of Kansas*, 274 U. S. 380 (1927) and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921). See also: *Corn Products Refining Co. v. V. C. Eddy, et al.*, 249 U. S. 427 (1919).

(v) This appeal draws in question the validity of Section 2309.59 of the Ohio Revised Code, Title 23, page 234, Page's Ohio Revised Code, as applied to this case by the Court of Appeals of Ohio, County of Cuyahoga, Eighth District. Such statute provides as follows:

"In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed or affected by reason of such error or defect. In the judgment of any reviewing court upon any appeal in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings and judgment under review. *In case such reviewing court determines and certifies that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at*

*the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded, and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining.* In case such reviewing court determines and certifies that in its opinion substantial justice has not been done to the party complaining as shown by the record, such court shall proceed as provided in section 2505.37 of the Revised Code." (Emphasis supplied.)

**QUESTION PRESENTED BY THE APPEAL.**

The following question is presented by this appeal:

When the Court of Appeals of Ohio, after finding that "some error is shown in the record," and without specifying what error it finds (Appendix "A"), relies upon an Ohio statute (Ohio Rev. Code, § 2309.59) permitting it to affirm or modify the judgment of a trial court upon a finding that substantial justice has been done and thereby, with remittitur, affirms a judgment of a trial court which has committed three separate acts of prejudicial error, does the judgment of the Court of Appeals constitute a deprivation of your petitioner's property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States?

**STATUTES AND CONSTITUTIONAL PROVISIONS.**

This case involves the Fourteenth Amendment to the Constitution of the United States, Section 1, the text of which is attached hereto as Appendix "G" and the pertinent portion of which reads as follows:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The case involves also two statutes of the State of Ohio, Ohio Revised Code § 2309.59, Page's Ohio Revised Code Annotated, Title 23, p. 234 and § 2125.02, Page's Ohio Revised Code, Title 21, p. 401, the texts of which are attached hereto as Appendices "E" and "F."

## STATEMENT OF THE CASE.

### 1. The Facts:

This case was an action for a wrongful death, commenced in the Common Pleas Court of Cuyahoga County, Ohio. The action was instituted against the Appellant by Helen Skiba, as administratrix of the estate of Walter S. Skiba, deceased. The case grows out of the facts surrounding a collision between a truck being operated by the decedent and a freight train being operated by the Appellant. The deceased lost his life in the collision.

The collision in question occurred on January 5, 1953, at the Pelton Road crossing of the Appellant's tracks in the City of Willoughby, Ohio. The decedent was operating his truck in a southerly direction along Pelton Road; the Appellant's freight train was being operated in a westerly direction approaching Pelton Road. The uncontradicted evidence in the case established that, as the deceased approached the crossing, there was a distance of at least twelve to fifteen feet before the crossing, from which the deceased had an unobstructed view in both directions along the right-of-way of the Appellant (R. Bill of Exceptions 84, 172). The evidence was uncontradicted that the vehicle, then being driven by the deceased, was in constant motion until the time of impact (R. Bill of Exceptions 97). The collision occurred during the daylight

hours. The evidence of the plaintiff indicated that gusts of snow were being swept about in the area of the crossing at the time of the collision (R. Bill of Exceptions 75).

**2. The Federal Question.**

(a) At the close of the plaintiff's case in the trial court, Appellant moved the court for a directed verdict on the ground that uncontradicted evidence established that the decedent was guilty of contributory negligence in failing to stop his vehicle and look in both directions along the track before proceeding across the crossing (R. Bill of Exceptions 194). The trial court overruled Appellant's motion (R. Bill of Exceptions 435) and submitted the case to the jury, which reached a verdict in favor of the plaintiff in the sum of One Hundred Ten Thousand Dollars ($110,000.00). This question was raised before the Court of Common Pleas by motion for judgment notwithstanding the verdict (R. _____, Defendant's motion for order setting aside the verdict of the jury and for an order for judgment notwithstanding the verdict of the jury).

(b) During the course of the trial, plaintiff offered in evidence, three (3) photographs depicting the demolished truck and lifeless body of the deceased. Appellant took seasonable objection to the photographs, but such objections were overruled (R. Bill of Exceptions 87). The objections were based upon the ground that the photographs were immaterial to the issues before the court. Appellant had admitted that the deceased was killed in the collision. Consequently, there was no issue as to the degree of force or impact of the collision. The plaintiff contended that certain obstructions on the Appellant's right of way obscured a view of the tracks by the deceased. Nevertheless, an examination of the photographs in question il-

lustrates quite clearly that they do not depict any material topography of the scene of the accident. They were, therefore, immaterial for the purpose of showing the physical characteristics of the crossing area. The photographs were calculated to inflame the minds of the members of the jury and did, in fact, induce the jury to enter a verdict motivated by shock, sympathy and bitterness, to the manifest prejudice of Appellant. This question was presented to the Court of Appeals by Assignment of Error. (R. Brief of Defendant-Appellant.) Appellant contends that the Court of Appeals erred in refusing to reverse the judgment of the trial court on this ground alone.

(c) The trial court, by its charge, misled the jury as to the measure of damages, which may properly be recovered in a death action under the law of Ohio. In that respect, the court charged the jury as follows:

> "In the event that you find that there is contributory negligence, then there can be no finding of damages.
>
> "If you find for the plaintiff, under the instructions of the Court, you will award as damages such sum, not exceeding the amount claimed in the petition, *as you find will fairly and reasonably compensate the estate of the decedent for the destruction of his power to earn money*, and in arriving at this amount, and in coming to a conclusion on this matter, you may consider the habits of the decedent at the time of his death; whether or not he was of an industrious capacity for earning money, his age, and the jury is authorized to consider all the testimony bearing on that subject.
>
> "*The rule just stated to you is the only rule which may be applied in this case;* in case, of course, you find for the plaintiff, then no consideration may be given by you to any other measure of damages, except the one stated. That is, that if you find for the

plaintiff you will award such sum as will fairly and reasonably compensate the estate of the decedent for the *destruction of his power to earn money.*

"What is the reasonable expectancy of what the family or next of kin might have received from the decedent, had it not been for the decedent's wrongful death? Or, to put it another way, had it not been for the defendant's wrongful act?

"You will please delete that last clause so that there will be no question about it.

"It will be as to what is the reasonable expectancy of what the family or next of kin might have received from the decedent, had it not been for the defendant's wrongful act." (Emphasis supplied.) (R. Bill of Exceptions 544 and 545.)

Section 2125.02 of the Ohio Revised Code defines the amount of damages which may be recovered in an action for wrongful death. The pertinent portion thereof reads as follows:

"An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. *The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought.* * * *" (Emphasis supplied.)

It is apparent from a comparison of the statute and the quoted portion of the charge of the Court that the jury was twice given an improper measure of damages. The Court, at two points, instructed the jury that the measure of damages is such sum as would "reasonably compensate the estate of the decedent for the destruction of his power to earn money." The statute, however, renders the damages recoverable, not on behalf of the dece-

dent's estate, but on behalf of persons named therein, and then, only in such sum as will compensate them for the "pecuniary injury" suffered by them as a result of the decedent's death.

The trial court charged the jury on the subject of damages as though Ohio law provided for recovery on behalf of the decedent's estate in a death case. The law of some states does so provide. An illustration of the principle may be found in the case of *Louisville & N. R. Co. v. Green*, 26 Oh. App. 392 (1927). In that case, the plaintiff brought action in Ohio to recover for a wrongful death occurring in Kentucky. Under governing conflicts principles, it was apparent that the law of Kentucky fixed the measure of damages in the case. Consequently, the charge of the Court was predicated upon Kentucky law. Kentucky law provided for recovery on behalf of the decedent's estate. The charge, as given in that case, is almost identical to the instructions of the Court in the case at bar in respect of the question now under consideration. 26 Ohio App. 404 and 405. *It would appear that the trial court in this case actually applied Kentucky law, rather than the law of Ohio.*

In the case at bar, the Court also neglected to instruct the jury to deduct from the gross sum of damages such sums as the decedent would have retained for his own use throughout the course of his life expectancy. The Appellant contends that the court erred in this specific respect as a natural result of its original error in charging that the plaintiff was entitled to recover the loss resulting to the estate of the decedent.

Appellant first raised objection to the charge of the trial court in respect of the issue of damages on motion for new trial (R. Defendant's Motion for New Trial and Brief). The trial court overruled your petitioner's mo-

tion for new trial (R. Common Pleas Journal Entry, April 27, 1954). The question was then presented to the Court of Appeals by Assignment of Error. The Court of Appeals affirmed the judgment except for modification by the granting of a remittitur of Thirty Two Thousand Dollars ($32,000.00).

Appellant has not raised the specific question of the applicability of the due process clause of the Fourteenth Amendment of the Constitution of the United States before any of the courts below. As illustrated, however, Appellant has raised the specific questions which give rise to the applicability of the due process clause. It is contended now that the cumulative effect of the errors in question constituted such an abuse of the judicial process as to deprive your petitioner of its property without due process of law. It is further contended that the question of the applicability of the Fourteenth Amendment to the Constitution of the United States was not ripe for decision until final judgment of the highest court of the State of Ohio, upon specific questions of state law posed.

The manner in which the Court of Appeals applied the aforementioned substantial justice statute constitutes a deprivation of property of Appellant contrary to the "due process" clause of the Fourteenth Amendment of the Constitution of the United States. It then became incumbent upon Appellant to appeal to the Supreme Court of Ohio the erroneous construction given the Ohio Substantial Justice Statute by the Court of Appeals. An overruling by the Supreme Court of Ohio of petitioner's motion to certify the record of the Court of Appeals and consequent refusal of that Supreme Court to review and correct the construction given the substantial justice statute resulted in the deprivation of property from which your petitioner here seeks redress.

A proper interpretation of the substantial justice statute would not have resulted in a deprivation of Appellant's property and until the highest court of Ohio refused to make such proper interpretation no constitutional issue, such as petitioner now urges, was present.

### 3. The Federal Question Is Substantial.

This Court has decided as recently as 1947 in the case of *Shelley v. Kraemer*, 334 U. S. 1, 14, that "the action of state courts and of judicial officers, in their official capacities, is to be regarded as action of the state within the meaning of the Fourteenth Amendment." The Court in the *Shelley* case, *supra*, went on to say that "the action of state courts in imposing penalties *or depriving parties of other substantive rights* without providing adequate notice and opportunity to defend has long been regarded a denial of due process of law guaranteed by the Fourteenth Amendment." The court continued at p. 17 by stating, "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the jurisdictional proceedings in such cases may have been in complete accord with the most rigorous conception of procedural due process."

In applying the rules enunciated by the *Shelley* case, *supra*, to the fact situation here confronting this Court, it is apparent that the application of the Ohio substantial justice statute (Ohio Rev. Code, § 2309.59) by the Court of Appeals of Ohio and subsequent refusal of the Supreme Court of Ohio to review such application results in the denial to this petitioner of rights guaranteed by the Fourteenth Amendment.

It has been frequently held by this and other courts that the right of appeal is not an essential element of due process of law. Where such appeal is provided, however, and where a party chooses to avail himself of the right of appeal, the courts are obligated by the aforementioned Fourteenth Amendment to afford the parties a fair hearing and if they are to be found liable, an enunciation of the grounds on which their liability was predicated.

We are here confronted with a case in which the trial court committed "some error," but we have not been apprised of the nature of such errors or the seriousness thereof. Obviously, if such errors were substantial and prejudicial to the rights of the appellant, they were of such a nature as to require the reversal of the decision of the lower court. To refuse to apprise the appellant of the nature of the errors which admittedly existed is to refuse to him a very real right, namely the right to know why his property is being taken from him. It is furthermore a denial to the appellant of the right to have a case reviewed by a court of appellate jurisdiction, since no appellate court can render a decision without first knowing the grounds for the decision which it is asked to review.

Both this and other Federal Courts have frequently enunciated the proposition that in order to conform to the rules of due process a court must afford to the defendant not only due notice but also opportunity to present every available defense.

In the case of *Thompson v. McDonald* (C. A., 10th, 1938) 95 F. 2d 935, Judge Bratton, in ruling on the efficacy of administrative proceedings of the Commissioner of Insurance of Kansas, said:

> "The basic requisites of due process when applied to judicial proceedings are that, having due regard

to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment, or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

How does the instant situation, in which the trial court admittedly erred and the reviewing court refused to state the grounds on which they based their decision differ from a situation wherein the defendant is refused a right to present all of his available defenses? Admittedly this question, in its present form, is one that is novel to this Court, but it must be evident that a very real analogy exists between the instant case and the various cases above cited, in which defendant has been deprived of opportunity to present all of his defenses. Appellant was here deprived of the right of reversal required by the prejudicial error of the lower court in charging the jury according to the Kentucky wrongful death statute and refusing to find that the plaintiff was guilty of contributory negligence as a matter of law although the uncontroverted evidence showed that but for the failure of the plaintiff to use proper precautions and utilize his unobstructed view of the tracks, the accident would not have happened. Appellant was further deprived of his property by the act of the Court of Appeals in refusing to delineate the grounds on which it based its decision, thus depriving the Supreme Court of Ohio of a basis on which it could review the decision and as a natural consequence thereof depriving the appellant of his property.

**4. The Appellate Jurisdiction of the Court is Properly Evoked.**

The applicable portion of Section 1257 of the Judicial Code, 28 U. S. C. § 1257 provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. * * *"

Appellant does not contend that Section 2309.59 of the Ohio Revised Code, providing that a court must disregard errors or defects not affecting the substantial rights of the parties, is invalid in all instances. Appellant contends merely that the statute is invalid as applied to the specific facts involved in the case at bar. The appellate jurisdiction of this Court may be evoked in such situations. *Fiske v. State of Kansas*, 274 U. S. 380 (1927); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921).

In *Dahnke-Walker Milling Co. v. Bondurant, supra*, the plaintiff, a Tennessee corporation, engaged in operating a flour and feed mill in Tennessee, brought an action in Kentucky against a resident of Kentucky for the breach of a contract for the sale and delivery of a crop of wheat. On a second trial of the cause the trial court directed a verdict against the plaintiff on the ground that it had not complied with a Kentucky statute regarding qualification of foreign corporations to do business in Kentucky. Plaintiff contended that the Kentucky statute was invalid as applied to the specific facts of the case in that the contract was one of interstate proportions and could not, therefore,

be governed by the Kentucky statute. Specifically, plaintiff contended that the statute, as applied to the facts of the case before the court, was violative of the Commerce clause of the Constitution of the United States. The Court of Appeals of Kentucky sustained the trial court. This honorable Court reversed the judgment. After noting that the controlling jurisdictional statute was Section 237 of the Judicial Code, the Supreme Court, in an opinion delivered by Mr. Justice Van Devanter, stated:

> "* * * The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. Poindexter v. Greenhow, 114 U. S. 270, 295, 29 L. ed. 185, 194, 5 Sup. Ct. Rep. 903, 962; St. Louis, I. M. & S. R. Co., v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493; Kansas City Southern R. Co. v. Anderson, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599. Besides a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. Yazoo & M. Valley R. Co. v. Jackson Vinegar Co., 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; Jeffery Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570. Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on writ of error; and if it be resolved against the validity, the review

can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put." (257 U. S. 289).

The same principle was reasserted in *Fiske v. State of Kansas, supra,* in which case the court stated:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code. Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 288, 66 L. ed. 239, 242, 42 Sup. Ct. Rep. 106. The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented. * * *" (274 U. S. 385.)

As has been previously pointed out, a question analogous to the question presented by this appeal has been raised before this Court in the case of *Shelley v. Kraemer, supra,* and other cases, and jurisdiction was taken by this Court under the authority of Section 1257 (2) of the Judicial Code, or its predecessor Section 236 of the Judicial Code. It is submitted, therefore, that Appellant properly evokes the appellate jurisdiction of this Honorable Court.

Respectfully submitted,

EDWIN KNACHEL,
DONALD E. RYAN,
*Counsel for Appellant.*

DONALD W. HORNBECK,
*Of Counsel.*

## APPENDIX A.

**Ruling of Supreme Court of Ohio on Motion for an Order to Certify its Record.**

It is ordered by the Court that this motion be, and the same hereby is, overruled.

## APPENDIX B.

**Opinion of the Court of Appeals.**

March 30, 1955.

PER CURIAM:

This appeal is here on questions of law. Defendant-appellant makes seven assignments of error in the trial of the cause in the Common Pleas Court of Cuyahoga County. We have considered all of them and in this per curiam opinion adhere to only those that we believe have some justification and the facts presented herein are limited to those required to discuss the assignments of error so found.

Plaintiff-appellee's decedent was instantly killed on the afternoon of January 5, 1953, by a westbound freight train while driving a truck across defendant-appellant's railway tracks at Pelton Road in the City of Willoughby, Ohio. The verdict of the jury was for $110,000.

The evidence discloses that there was a single track crossing a busy road in this city and that a "cross-buck" sign was the only warning to those crossing the tracks. On the day of the accident, the weather was windy with occasional snow flurries which were blown into swirls and clouds by the high winds and obscured the view of the "cross-buck" sign and interfered in the observance of ap-

proaching trains. A bank extended on the east side of Pelton Road along the right of way of the railway to about 20 feet north of the track; on top of this bank and extending to about 12 or 15 feet from the tracks there was brush and weeds between five and six feet high. These, together with other obstructions, made it impossible to see trains approaching from the east for one in a vehicle until the front of such vehicle was almost on the tracks. The westbound freight train involved in this accident was traveling downhill at a speed in excess of 50 miles per hour, which speed was in violation of railroad rules and manifestly unreasonable in view of the condition of the weather and other factors present at this intersection. The locomotive whistle was not sounded nor was the bell rung until the locomotive was about to cross Pelton Road and the train was headed into a high southwesterly wind which made it difficult to hear the sound of an approaching train from the east. The truck driven by the decedent had almost completed crossing the tracks when struck. The evidence disclosed negligence on the part of the defendant railway.

Assignment of Error No. 3 claims that the verdict of the jury was excessive, it appearing to have been rendered under the influence of passion and prejudice. We conclude, upon reading the bill of exceptions, that the verdict was excessive but not rendered under the influence of passion and prejudice and order a remittitur of $32,000.

In Division (A) of Assignment of Error No. 7, defendant-appellant claims the Court failed to separately and definitely state the issues of fact to be decided by the jury. It seems to us with respect to Specification No. 2 which reads as follows:

> "In failing, in the operation of said train as it approached the intersection of the right-of-way of the defendant Nickel Plate Road and Pelton Road in the

> City of Willoughby, Ohio, to sound the whistle on said engine and in failing to ring the bell carried on said steam operated locomotive, all as required by law."

and Specification No. 3 which reads:

> "In operating said train into and across the intersection of Pelton Road and the tracks of the defendant Nickel Plate Road at a speed greater than was reasonable and proper under the facts and circumstances then obtaining."

the Court should have elaborated and explained the requirements of law to the jury as regards the sounding of a whistle and a ringing of the bell as well as giving an explanation of the expression "speed greater than was reasonable and proper under the facts and circumstances then obtaining." However, the excess of speed and failure to sound the whistle and ring the bell before coming to Pelton Road were so evident from the testimony presented in the record that we are unable to see that such error on the part of the Court with respect to this portion of this charge was prejudicial to the defendant-appellant. Moreover, it is clear in the record that the Trial Court on two separate occasions asked counsel whether "there was anything by way of addition or subtraction on the part of defendant as to the charge." Counsel for the defendant-appellant on each occasion made no request of the Court either to elaborate on or to explain further as to any of these matters and thereby indicated no further explanation by the Court in its charge to the jury was in order or required.

After a careful reading of the entire record in this case and a full study of the able briefs submitted by counsel, we hold unanimously that, with the lone exception of the verdict being excessive, substantial justice has been done the party complaining. The plaintiff-appellee having ac-

cepted the remittitur of $32,000, the judgment of the Common Pleas Court is accordingly modified to read $78,000 and as modified is affirmed.

Exceptions. Order See Journal.

KOVACHY, *P.J.*, HURD, *J.*, SKEEL, *J.*, concur.

## APPENDIX C.

**Mandate to Common Pleas from Court of Appeals.**

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court of Cuyahoga County, and was heard on the assignments of error, the original papers and transcript from said court. Upon due consideration thereof, the court finds that while some error is shown by the record, it is evidence that substantial justice has been done defendant-appellant (Sec. 2309.59 R. C.), except as to the amount of the verdict which is excessive although not the result of passion or prejudice, and orders a remittitur in open court, it is, therefore, ordered that the judgment of the Common Pleas Court be reduced to Seventy Eight Thousand Dollars ($78,000.00), as of the date of its entry in the Common Pleas Court.

The court further finds no error prejudicial to the appellant and therefor the judgment of the Cuyahoga County Common Pleas court as modified is affirmed and it is ordered that appellee recover of appellant the costs herein taxed. The court finds that there is reasonable grounds for this appeal.

Ordered, that a special mandate be sent to said Court of Common Pleas, to carry this judgment into execution. Exceptions.

## APPENDIX D.

### Motion For an Order to Certify.

Now comes The New York, Chicago and St. Louis Railroad Company, appellant herein, and moves the Court for an order directing the Court of Appeals of Cuyahoga County, Ohio, to certify its record in the above captioned action to the Supreme Court of Ohio for the purpose of review of the judgment of said Court of Appeals entered on the 9th day of March, 1955, against defendant-appellant and in favor of plaintiff-appellee.

Appellant represents that it has heretofore filed notice of appeal in the Court of Appeals and a similar notice in this Court, as required by law.

Appellant predicates its motion upon the following grounds:

(1) This cause and the questions involved therein are of great general interest.

(2) There is probable error in the record of said cause.

WHEREFORE, said appellant makes application for an order directing said Court of Appeals to certify its records to the Supreme Court.

DONALD W. HORNBECK
*Attorney for Defendant-Appellant.*

*Of Counsel:*

EDWIN KNACHEL,
DONALD E. RYAN.

## APPENDIX E.

**Ohio Revised Code, § 2309.59. Reviewing court to disregard certain errors.**

"In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed or affected by reason of such error or defect. In the judgment of any reviewing court upon any appeal in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings and judgment under review. In case such reviewing court determines and certifies that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court be deemed not prejudicial to the party complaining and shall be disregarded, and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining. In case such reviewing court determines and certifies that in its opinion substantial justice has not been done to the party complaining as shown by the record, such court shall proceed as provided in section 2505.37 of the Revised Code."

## APPENDIX F.

**Ohio Revised Code, § 2125.02. Proceedings.**

"An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid."

## APPENDIX G.

**United States Constitution, Amendment XIV.**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

MAR 21 19
HAROLD B. WILLEY,

# In the Supreme Court of the United States

No. 707.

OCTOBER TERM, 1955.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

*Appellant,*

vs.

HELEN L. SKIBA, Administratrix,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

GEORGE J. McMONAGLE,
RICHARD E. McMONAGLE,
JOHN A. VERHUNCE,
1202 Engineers Building,
Cleveland 14, Ohio,
*Attorneys for Appellee.*

THE BAYED LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-0847

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# In the Supreme Court of the United States

**No. 707.**

**OCTOBER TERM, 1955.**

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

*Appellant,*

vs.

HELEN L. SKIBA, Administratrix,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

## MOTION TO DISMISS OR AFFIRM.

Now comes the Appellee and respectfully moves the Court for an order dismissing the within appeal or affirming the judgment of the Court of Appeals of Cuyahoga County, Ohio on the following grounds:

1. **The appeal does not present a substantial federal question.**

Appellant's sole contention here is that Ohio's Substantial Justice Statute (Ohio Revised Code Section 2309.-59) "as applied by the Court of Appeals, is invalid as contravening the due process clause of the 14th Amendment of the Constitution of the United States." (Appellant's Notice of Appeal.)

Appellant's contention necessarily being that

(a) Where it is found that any error occurred in a state court trial that the functions and duties of the Supreme Court of the United States include the weighing of the effect such error had—considering all the proceedings —on the outcome of the trial, under the theory that the loser is deprived of his property without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

and

(b) That no court has the right to disregard any error, however harmless, and that therefore all of the statutes of the states and also Rule 61 of the Federal Rules of Civil Procedure, which provide that harmless error in court proceedings must be disregarded, are invalid as contravening the due process clause of the 14th Amendment of the Constitution of the United States.

Under neither of these contentions is a substantial federal question presented. Under (a) the functions of the Supreme Court of the United States would be reduced to those of a State court of original review. Under (b) it would be practically impossible to ever conclude any litigation because some error creeps into the record of practically every contested law suit.

It is however the universal and constitutional rule that harmless error must always be disregarded and such has been the decision of the eleven judges who have heretofore reviewed the within matter.

Appellant presents no substantial federal question in this appeal—actually it presents no legal question whatsoever.

This was an action between citizens of the State of Ohio, based upon Ohio law and tried and reviewed by

Ohio courts—including the highest court of the State of Ohio.

The Court of Appeals found that the judgment should not be reversed but that a modification thereof would do more complete justice to the party complaining and the judgment was modified accordingly.

2. **The federal question sought to be reviewed was not timely or properly raised, or expressly passed on.**

Appellant's jurisdictional statement not only does not specify the courts, methods, stages and manner in which the federal question sought to be reviewed was raised and passed upon in the lower courts as required by Supreme Court Rule 15, Section 2-D, but *appellant admits* in page 10 of its jurisdictional statement filed herein, *that it did not raise this question before any of the courts below.* Appellant had ample opportunity to raise the so-called federal question if any such question existed in this case. No such question was raised because none existed.

Although appellant now contends that the judgment of the Court of Appeals of Cuyahoga County, Ohio was in contravention of the 14th Amendment of the Constitution of the United States, it did not so contend in the proceedings it thereafter took to the Supreme Court of Ohio; that although Article 4, Section 2 of the Ohio Constitution provides that the Supreme Court of Ohio has "appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state" such appellate jurisdiction was not invoked in this case. The defendant attempted to have the matter reviewed by the Supreme Court of Ohio by an allowance of a Motion for an order to certify the record (Appendix D, Appellant's Jurisdictional Statement herein) under said Section of the

Ohio Construction (Article 4, Section 2) which provides as follows:

> "In cases of public or great general interest, the Supreme Court may, within such limitations of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals."

Even after the Supreme Court of Ohio had overruled appellant's motion for an order to certify the record and it filed an application for rehearing in said court, said application for rehearing did not raise this so-called federal question.

3. **The judgment rests on an adequate nonfederal basis.**

4. **It is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.**

GEORGE J. MCMONAGLE,
RICHARD E. MCMONAGLE,
JOHN A. VERHUNCE,
1202 Engineers Building,
Cleveland 14, Ohio,
*Attorneys for Appellee.*

# In the Supreme Court of the United States

**No. 707.**

**OCTOBER TERM, 1955.**

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

*Appellant,*

vs.

HELEN L. SKIBA, Administratrix,

*Appellee.*

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

## STATEMENT OPPOSING JURISDICTION.

### JURISDICTIONAL QUESTION.

Neither the statement by the appellant, nor the record, discloses that the Supreme Court of the United States has jurisdiction in this particular case. Actually it does not. No federal question was presented or passed upon by the state courts and none now, or ever, existed in this action.

It is elementary that The United States Supreme Court must decide whether it has jurisdiction in a particular case and must decide whether the federal question involved was necessarily passed upon by the state court, and such determination must rest upon examination of the record.

*Honeyman vs. Hanan*, 300 U. S. 14—Appeal from the Supreme Court of New York:

Syl. 1—"To constitute jurisdiction of an appeal from a state court, it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. Page 18."

2—"Whether those requirements have been met is itself a federal question."

3—"In deciding whether it has jurisdiction, this court must determine whether a federal question was necessarily decided by the state court; the determination must rest upon an examination of the record, and while a certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon may aid this court in such examination of the record, it can not avail to foreclose the inquiry or to import a federal question into the record."

In delivering the opinion, Mr. Chief Justice Hughes stated at page 18:

"Before we may undertake to review a decision of the Court of a state, it must appear affirmatively from the record, not only that a federal question has been presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause."

*Lynch, et al. vs. New York, ex rel. Pierson,* 393 U. S. 52:

Syl. 1—"Jurisdiction to review a judgment of a State court can not be founded upon surmise or be sustained by references to briefs and extrinsic statements. It must appear affirmatively from the record that a federal question was necessarily decided in determining the cause and if it be uncertain whether the judg-

ment was based upon a federal ground or upon a non-federal ground sufficient to sustain it, this court will not take jurisdiction. Whether a federal question is properly raised in the trial court of the state is a question of state practice and if it is passed upon and denied by the highest court of the state, the supreme court of the United States has jurisdiction to review the judgment of the state court. North Carolina R. Co. vs. Zachary, N. C. 1914—U. S. 232, Page 248."

**STATEMENT.**

Defendant states in several places in its Jurisdictional Statement that the Court of Appeals gave no reason, rendered no opinion and refused to specify what harmless error it found occurred at the trial. This statement is wholly and absolutely inaccurate as the said Jurisdictional Statement, Appendix B, page 17 actually contains a copy of the opinion of the Court of Appeals and discusses the matter now complained of.

This opinion at page 19 further contains the following:

"Moreover it is clear in the record that the Trial Court on two separate occasions asked counsel whether 'there was anything by way of addition or subtraction on the part of defendant as to the charge.' Counsel for the defendant-appellant on each occasion made no request of the Court either to elaborate on or to explain further as to any of these matters and thereby indicated no further explanation by the Court in its charge to the jury was in order or required."

**THE FACTS.**

The defendant railroad operated its main line upon a single track in an easterly-westerly direction, crossing Pelton Road, a north-south highway in the City of Willoughby.

On January 5, 1953, the decedent, Walker Skiba, was 34 years of age and he had a life expectation at that time of 38 years or 13,870 days. His wife, Helen Skiba, was then 31 years of age and they had two children, Catherine, who was then nine years of age and James who was 16 months of age. The decedent was engaged in business for himself and support of his wife and two children. He was earning $125.00 per week.

January 5, 1953, was a cold windy day. It was below freezing. There had been a considerable amount of snow during the day and it was extremely windy at the time in question with the wind blowing heavy swirls and clouds of snow which obscured the vision.

The crossing was one strange to the decedent. There was no evidence that he had ever previously crossed it, seen it or even knew that it existed. His home was miles south of where the crossing was located and his work was in the vicinity of, or south of, his home. He lived in Kirtland, Ohio, and the crossing was in Willoughby, Ohio (R. 178).*

Because of the condition of the weather that day, it was not possible to work outside. He left home about 1:00 P. M. At about 4:00 P. M., he was driving south on Pelton Road, which was a "real rough road" (R. 74) and had an icy and slippery surface near the railroad and which, as it immediately approaches the railroad from the north, is downgrade. He was operating a Willys pickup truck. As he was approaching the railroad crossing he was being followed at about two car lengths by a car driven by one Robert L. Grinstead. They both maintained about the same speed. When they got close to the point where it developed the tracks were located, they were going about five to ten miles per hour.

---

* Indicates record pages of typewritten transcript.

At the time in question, this railroad crossing which included the 50 feet to the north of the tracks that consisted of the railroad crossing right of way over and adjacent to Pelton Road, *was an extremely dangerous one.*

It consisted of a single track laying in a hollow; although the New York Central Railroad which crossed Pelton Road about 1500 feet north of, and parallel to, this Nickel Plate crossing had an automatic flasher and bell which warned of the approach of trains, the Nickel Plate crossing had none, neither did it have any crossing gates nor watchman—only crossbucks which the evidence disclosed were obscured part of the time—the exact location of the tracks were difficult to ascertain (see photo exhibits) on the north approach; there was a sharp turn of the tracks to the west commencing with Pelton Road; vision down the tracks in both directions was badly obstructed; on the east side of Pelton Road a bank extended to about 20 feet north of the track; on top of this bank there was brush and weeds between five and six feet high; these extended at the height of five to six feet to about 12 to 15 feet from the tracks and then alongside the railroad tracks to the east; these obstructions to view were located on the Nickel Plate right of way which extended 50 feet north of the tracks and they continued north alongside of the road up to a house located 176 feet north of the tracks, and which, together with garages and small buildings about it, further obstructed the view of the track to the east. The view to the west was obstructed by brush, weeds and trees in close proximity of the tracks. It was impossible to see trains approaching from the east until the front of a truck or car was almost on the tracks. Even at that point, the view was further obstructed in that brush and weeds extended alongside of the track to the east.

A train of the defendant railroad which was classified as a fast freight train (Train No. 51) (R. 59) and was scheduled to leave Conneaut, Ohio, at 8:40 a.m. (R. 71) and to arrive at Willoughby at about 10:00 a.m. was approaching the Pelton Road crossing about six hours late, to-wit: at about 4:00 p. m. It was traveling downhill at a speed in excess of 50 miles per hour, as shown by the tape recording on it (R. 159); it had apparently reached the peak of its speed some distance east of this point and was coasting downhill; its rate of speed was unreasonable within a city and in violation of the railroad rules. Defendant's counsel in his opening statement (R. 23) said the railroad limit there was 60 miles per hour and the engineer (R. 61) said the same, but the road foreman, Milton Colyer, testified (R. 159) the curve starts right at Pelton Road and the speed limit was 50 miles per hour at the beginning of the curve (R. 160) and this is also shown by the time table (Exhibit A) (R. 162).

The locomotive whistle was not sounded nor was its bell rung, as required by law, until the locomotive was actually on the Pelton Road crossing and in collision with Mr. Skiba's truck; the train was heading into a high southwesterly wind (P. Exhibit 15, weather report "Fastest velocity that day was 31 m.p.h. from the west") so that the sound of the approaching train was made difficult to hear not only by the sound of the Skiba engine and the high wind but the direction of the wind carried sounds to the east, away from where Mr. Skiba was, not towards him; the locomotive struck the Skiba truck after it had almost completely crossed the track and threw it in a southwest direction.

The high wind spasmodically, and at the time in question, blew the snow into larger swirls and clouds of snow towards the train so that the train itself was enclosed and

obscured in a cloud of snow, as it approached and came onto the crossing; that this cloud of snow was of a continuing type being created and enveloping and surrounding the train as it was approaching the crossing.

There were two witnesses in close proximity to the crossing when the collision occurred, Robert L. Grinstead and Milan Lett, neither of whom actually saw the collision because of the condition of the elements but testified as to facts immediately before and after it occurred. Their testimony established negligence by the railroad and the exercise of due care by the decedent.

**ALLEGED SUBSTANTIAL FEDERAL QUESTION.**

It is submitted that the items which appellant contends present a Federal question for this Court to decide adversely to the decisions of all the courts below have been correctly decided by the courts charged with the duty to do so.

(a) Appellant contends that the courts should have decided that plaintiff's decedent was guilty of contributory negligence as a matter of law. Under the law and facts in this case that decision was for a jury and the Ohio courts did not take from the jury this constitutional function.

(b) The trial court, within its discretion, properly admitted certain photographs which provided the jury with evidence bearing on the issues in the case. All Ohio courts have held this proper under Ohio law.

(c) The trial court properly charged the jury in accordance with the law. The Court of Appeals held that it should have elaborated on some phases of the charge but its failure to do so was not prejudicial to the appellant. It obviously was not prejudicial under Ohio law because at the time of the trial counsel for the defendant

not only did not request any elaboration, subtraction or addition to the charge but specifically advised the court on two occasions that it did not want anything added to or subtracted from the charge. Near the close of the charge the following transpired (R. 549):

> "The Court: The court wishes at this particular time likewise, to inquire if there is anything by way of *addition* or *subtraction* on the part of the defense.
>
> Mr. Knachel: No, your Honor."

Items (a), (b), and (c) do not present any legal questions let alone substantial federal questions calling for a decision by the Supreme Court of the United States.

Appellant draws into question the validity of Ohio Revised Code Section 2309.59 and contends that its constitutional rights were deprived it by operation of this statute. Ohio General Code, Revised Code Section 2309.59, to-wit:

> "*Reviewing Court to disregard certain errors.*
>
> In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No judgment shall be reversed or affected by reason of such error or defect. In the judgment of any reviewing court upon any appeal in any civil action, when it is sought to reverse any final judgment or decree or obtain a new trial upon the issues joined in the pleadings, such reviewing court shall certify on its journal whether or not in its opinion substantial justice has been done the party complaining, as shown by the record of the proceedings and judgment under review. In case such reviewing court determines and certifies that in its opinion substantial justice has been done to the party complaining as shown by the record, all alleged errors occurring at the trial shall by such reviewing court

be deemed not prejudicial to the party complaining and shall be disregarded, and such judgment or decree under review shall be affirmed, or it shall be modified if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining. In case such reviewing court determines and certifies that in its opinion substantial justice has not been done to the party complaining as shown by the record, such court shall proceed as provided in Section 2505.37 of the Revised Code."

It is a matter of record that the Federal Courts also have a rule of substantial justice which is almost identical with the Ohio statute brought into question here. It is contained in Title 28, U. S. C. A., Rule 61 and is as follows:

RULE 61—HARMLESS ERROR.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court not consistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

Does appellant herein question the validity of this Federal Rule?

The harmless error provision of this rule and of Rule 52(a) of Federal Rules of Criminal Procedure are a mere restatement of existing laws embraced within former Section 391 of this title, directing reviewing courts to give judgment without regard to technical errors and defects or exceptions which do not affect the substantial rights of the parties—(*Kotteakos vs. U. S.*, 328 U. S. 750).

U. S. C. A. Title 28, Section 2111, provides as follows:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

*Eugene B. Smith & Co., Inc., vs. Russek et al.*, 212 F. 2nd 338, U. S. Court of Appeals, 5th Circuit, April 30, 1954:

Action by seller against buyer for breach of alleged contract to buy 1665 bales of cotton at 81.75¢ per pound. United States District Court for the Southern District of Texas, Ben C. Connally, J., entered judgment upon verdict for the seller and buyer appealed. The Court of Appeals, Holmes, Circuit Judge, held that, where a verdict appeared to be about the lowest sum that could have been awarded under the evidence regardless of whether the measure of damages was as stated by trial court or was determined to be correct by the Court of Appeals, error, if any in measure of damages as stated by trial court was not prejudicial.

*Richard H. Walsh, Appellant vs. Bekins Van Lines Company,* 217 F. 2nd 338, U. S. Court of Appeals, 8th Circuit, December 21, 1954:

"A judgment on the jury's verdict will not be reversed on appeal unless appellant shows from entire record that he was denied some substantial right."

**The Ohio Substantial Justice Statute.**

The need of the State Substantial Justice Statute, Ohio Revised Code 2309.59, and the value of it is set forth in greater detail in 4 *Ohio Jurisprudence* 2d 18, Sec. 829:

GENERAL RULE:

"Following the foregoing statutory provisions, and in accordance with the usual practice elsewhere, the

Ohio reviewing courts, in civil cases, have adopted in full the general rule that to warrant a reversal, an error must have been prejudicial to the substantial rights of the party complaining of it."

4 *Ohio Jur.* 2d 23:

"In view of the fact that irregularities, inaccuracies, and minor errors are almost certain to creep into the record in any hotly contested lawsuit, it is evident that a less liberal rule would lend itself to vexations and prolonged litigation and hinder the prompt determination of the rights of litigants. Moreover, the rule as laid down by the legislature and followed by the courts is certainly a wholesome one and in line with the modern tendency of courts generally to overlook, as far as possible, errors as to incidental matters and to look to the substantial merits of the case. It recognizes that courts are created to deal out justice rather than merely to apply abstract rules of law, and that the object of a review proceeding is to reach the judgment and to avoid it when, and only when, it does not possess the elements upon which all judgments should stand."

**IRRELEVANCY OF CASES CITED BY APPELLANTS.**

The cases cited by appellants are demonstrative of the practice of selecting a small portion of a case which is favorable to them, and disregarding the entire case and the full principle enunciated therein. We shall herein consider each of the cases cited by appellants and establish that they do not in any way support their contention. We believe that a complete study of these cases will support our motion to dismiss or affirm.

The first case cited by appellants in support of their contention that the United States Supreme Court has jurisdiction to hear this case is *Fiske vs. State of Kansas,* 274 U. S. 380. The facts in *Fiske vs. State of Kansas* are:

The State of Kansas passed a statute which defined "criminal syndicalism" as the doctrine which advocated overthrow of the existing order by violence. Plaintiff in error was tried and convicted, having been charged with violating the criminal syndicalism act. Defendant testified that the organization of which he was a member (Worker's Industrial Union) did not preach or practice any unlawful matters. In the trial, the state offered no evidence thereon.

On appeal to the Supreme Court of the State, defendant contended that his arrest and conviction were in violation of the Constitution and especially the 14th Amendment.

At page 385, the Court states:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was *a distinct and timely insistence* that, if so applied, the statute was void under the federal constitution necessarily affirms the validity of the statute as so applied and the judgment is therefore reviewable by writ of error under Section 237 of the Judicial Code (Cite *Dahnke Walker* Case). The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented."

In this case, the Court held that there was no charge or evidence that the organization advocated any crime or violence, etc. The application of the statute was a violation of the due process clause of the 14th Amendment.

In the above cited case, the Supreme Court of the United States properly applied the due process clause of the 14th Amendment. Furthermore, in the *Fiske vs. Kansas* case, there was a *distinct and timely insistance that as so applied the state statute was void.* Therefore, on the jurisdictional question with which we are now con-

cerned, the above case was properly before the Supreme Court of the United States on a writ of error. In our case, the validity of the statute was not distinctly or timely raised, as admitted by appellants. We must, therefore, contend that the *Fiske vs. Kansas* case supports our motion to dismiss.

The second case cited by appellants is *Corn Products Refining Company vs. V. C. Eddy, et al.*, 249 U. S. 427. The facts in this case were that the state of Kansas passed a state regulation respecting the labeling of syrup compounds and required the manufacturer to label syrups as to the percentage of each ingredient. Plaintiff in this case brought an equitable action against the state board of health averring that the state law and regulations referred to were void because in conflict with the Interstate Commerce Clause, Article I, Section 8 of the Constitution and in conflict with the 14th Amendment. The Court on page 431 immediately disposed of the constitutional question in the following language:

> "It is not seriously insisted that there is a denial of the equal protection of the laws and we see no ground for such contention. There is no discrimination against plaintiff in error or its product as against syrups as a class."

The facts in the above cited case were in no way similar to our case but it is clear that when claimant brought his action, the Federal question was timely and properly raised. Therefore, the case on the jurisdictional matter was properly brought before the Supreme Court of the United States. This is a further enunciation of the need to raise the Federal question in the State Court. Since this was admittedly not done in our case, we again contend that this case as cited by the appellants is further in support of our motion to dismiss.

The third case cited by appellants is *Dahnke Walker Milling Company vs. Bondurant,* 257 U. S. 282. This was an action to recover damages for breach of contract for the sale of a crop of wheat. The Court in Paragraph 1 of its Syllabus set forth:

> "1. A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was not merely a claim of right or immunity under the constitution but a distinct timely insistance that if so applied to it, the statute was unconstitutional and void, necessarily affirms the validity of the statute when so applied and the judgment passed thereon is therefore reviewable upon a writ of error under Section 237 of the Jurisdictional Code as amended September 6, 1910—page 288."

In its conclusion, the Court stated:

> "Our conclusion on the jurisdictional question is that if the state court applied and enforced to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted was repugnant and void, the case is rightly heard on the writ of error."

Here again, we find the court clearly stating that it will consider only matters on a writ of error where the party has seasonably insisted that a statute was unconstitutional and void.

The fourth case appellants cited is *Shelly vs. Kraemer,* 334 U. S. page 1. The facts in this case were that a number of property owners signed an agreement which restricted property in a certain subdivision to be sold only to persons of the Caucasian race. The case involved racial restrictive covenants. The court on pages 8 and 9 stated that the only constitutional question which the appellants have raised in the lower courts, and hence the only constitutional issue before this Court was the validity of the covenant agree-

ments as such. The court in this case held that granting jurisdictional enforcement to the restrictive covenants, the State denied petitioners the equal protection of the law and that freedom from discrimination was one of the basic objectives of the 14th Amendment and violative of the equal protection clause of the 14th Amendment for State Courts to enforce them.

In our case, we have no question of discrimination but again we must submit that the case as cited by the appellants clearly points out that the constitutional question was raised in the lower courts. Since in our case it was not raised, the motion to dismiss lies.

Appellant (p. 12) cites *Thompson vs. McDonald*, 95 F. 2nd 935, Judge Bratton in ruling on the efficacy of administrative proceedings of the commissioner of insurance of Kansas, and in substance repeats his language to the effect that an order, judgment or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties be afforded an opportunity to present every available defense. With this ruling, we have no complaint but question the accuracy of appellant's citation. It refers to case of *Thompson vs. McDonald*, 95 F. 2nd 935, which has no relation to the ruling of Judge Bratton in that the *Thompson vs. McDonald* case is reported on page 937 of 95 F. 2nd and involves a case pertaining to the enforcement of motor carrier laws within the State of Texas. The ruling and language cited by appellant which is actually on page 935 pertains to "*State of Kansas, ex rel. Beck, Attorney General, et al.,*" and involves a constitutional question.

We are at a loss to understand why appellant has injected this matter into the case other than possibly to further confuse the issue.

## CONCLUSION.

The verdict herein was rendered by a jury of twelve. It was unanimous. All twelve jurors signed the verdict. The trial court, three judges of the Court of Appeals and seven judges of the Ohio Supreme Court have upheld the verdict. If there was any error herein, which we deny, it was cured by the remittitur ordered by the Court of Appeals and accepted by the plaintiff.

It is respectfully submitted that the action of the appellant in taking this matter to the Supreme Court of the United States is a dilatory one and that the motion of the appellee for an order dismissing the appeal or affirming the judgment should be granted.

Respectfully submitted,

GEORGE J. MCMONAGLE,
RICHARD E. MCMONAGLE,
JOHN A. VERHUNCE,
1202 Engineers Bldg.,
Cleveland 14, Ohio,
*Attorneys for Appellee.*